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IN THE

Supreme Court of the United States

October Term, 1958

No. 156

Irving Shayne,

Petitioner,

vs.

United States of America,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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No. .....

IRVING SHAYNE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice Earl Warren and to the Honorable Associate Justices of the Supreme Court of the United States:

Comes now Irving Shayne and petitions this Honorable Court for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit and in respect thereto sets forth as follows:

Jurisdiction.

Jurisdiction is conferred by Title 28, Sections 1254(1), United States Code, and by Rules 22 and 23, Rules of the Supreme Court of the United States. The judgment of the United States District Court was rendered May 10, 1958. Petition for rehearing within the time allowed by law was duly filed on June 6, 1958, and denied on June 9, 1958. This petition for certiorari is filed within 30 days of the order denying the petition for rehearing.

Questions Presented.

1. Whether the defendant was erroneously charged with multiple conspiracies in a single count in violation of the rule of *Kotteakos v. United States*, 328 U. S. 750, and whether this procedure denied fair trial guaranteed by the Fifth Amendment to the Constitution of the United States.

2. Whether the trial court committed prejudicial error in sending the indictment to the jury room during its deliberations without sending the bill of particulars to the jury room or calling it to the attention of the jury when the indictment charged *several* persons with the conspiracy but the government had by bill of particulars limited the charges to the two named defendants and eliminated all *other* persons as conspirators.

3. Whether the trial court erroneously instructed the jury that the "other" persons rather than the two defendants could be conspirators contrary to the specifications and limitations placed upon the case by the specifications in the bill of particulars that only the two defendants were co-conspirators.

4. Whether the indictment failed to state an offense against the United States in that it failed to inform the accused of the nature and cause of the accusation as required by that amendment.

5. Whether the court erred in denying the defendants a complete bill of particulars as requested and whether this denied the defendants an opportunity to prepare fully for their defense.

6. Whether the court erred in refusing the defendants the right of full inspection of all the documents and re-

fusing to order compliance with a *subpoena duces tecum* to the government to produce all the documents.

7. Whether section 1010 of the United State Code, Title 18, has been unconstitutionally construed and applied and is inherently unconstitutional in violation of the due process clause of the Fifth Amendment as being too vague, indefinite and uncertain.

8. Whether the section regarding *false statements* requires the application of the *two-witness rule,* as in perjury prosecutions. This was left undecided in *Gold v. United States,* Oct. 1956 term.

9. Whether the verdicts are contrary to the law and the evidence and whether the evidence is insufficient to support the verdicts.

10. Whether the court erred in instructing the jury contrary to the specifications in the bill of particulars and whether plain error should be considered by the court on appeal.

11. Whether the trial court erred in failing to grant judgment of acquittal on the conspiracy count when the jury acquitted Irving Shayne of all the substantive counts and whether such acquittal was *res judicata* on the conspiracy count.

12. Whether there can be a single conspirator.

13. Whether the trial court erred in failing to grant a new trial when it developed that a juror who sat on the trial throughout had defective hearing and it was first discovered at the time of the hearing on the motion for a new trial.

14. Whether the court should have granted a new trial when it developed that one of the jurors had gone to sleep during the trial.

15. Whether the offenses are barred by the Statute of Limitations when the alleged offense was committed at a time when the Statute of Limitations was three years, and prior to later change in the Statute of Limitations to five years.

The Facts.

This is an appeal from a judgment of conviction of one of two brothers, Max Shayne and Irving Shayne, of conspiracy (count one) to violate Section 1010 of Title 18, United States Code. The alleged offenses took place four years before the trial. The conspiracy charge encompassed the period between June, 1952, and April, 1953, but the overt acts occurred in 1952, except two that were not proved in furtherance of any conspiracy.

The Procedure.

The defendants, Max and Irving Shayne, were indicted January 4, 1956, in a multiple indictment—to-wit, nine counts [Cl. Tr. 1-92]. Count one charged conspiracy to obtain loans under Title 12, Section 1703, by means of false and fraudulent written statements which would be made by the defendants and their co-conspirators, which loans would not be made according to the act and regulations. During the pendency of the appeal Max Shayne died and he is no longer before the court.

The indictment charged the conspiracy to begin in June, 1952, and continue until April, 1953, charging that they conspired "together and with other persons, whose names are to the grand jury unknown, * * *."

Demand was made for a Bill of Particulars, requesting, among other things, specifications as to who were the other persons with whom the defendants conspired. [See Clerk's Transcript—Mo. Bill of Particulars, Feb. 15, 1956.] The Government replied, in the few points ordered answered, as follows:

> **"The government will not contend at the trial that any other persons were co-conspirators with the defendants."**

The indictment was sent to the jury room after the jury retired to deliberate. [R. Tr. 2424 and 2435.] The court stated

> "and the entire indictment, excluding the count that has been dismissed, will be sent to the jury room for your use, because it will appear from these instructions you should check portions of it with considerable detail." [R. Tr. 2424.]

The court then read to the jury as part of his instructions:

> "Beginning on or about the month of June 1952 and continuing until the month of April 1953, defendants Max Shayne and Irving Shayne did wilfully and knowingly agree and conspire together and with other persons, whose names are to the grand jury unknown, as follows:" [R. Tr. 2424.]

The court did not send the Bill of Particulars to the jury room, nor did he inform the jury that the conspiracy was limited to Max and Irving Shayne by reason of the Bill of Particulars.

—o—

Contrary to the Bill of Particulars, the court instructed the jury as follows:

> **"While it is necessary that there be two or more conspirators, one of the persons on trial can be found to have not been one of the two or more. Now, the case as it has developed here has presented the possibility that many persons other than those on trial might lawfully be found to have been members of a conspiracy. And if you believe one or the other or both of the defendants were members of such conspiracy, then you could return a verdict of guilty as to each defendant."** [R. Tr. 2452.]

The indictment charged the defendants with conspiracy in count one, and with substantive counts in two to nine, inclusive. During his argument the prosecutor said:

> "Now, Ladies and Gentlemen, these substantive counts themselves are the basis of our proof on the conspiracy." [R. Tr. 2293.]

Irving Shayne was acquitted on the substantive counts.

The indictment thus actually, in effect, charged eight little conspiracies, one with each of the applicants for F. H. A. loans, in one grand and general conspiracy count in violation of the rule laid down in *Kotteokos v. United States,* 328 U. S. 750, 90 L. Ed. 1557.

Count two charged causing a false statement to be passed, uttered and published to the Citizens National Trust & Savings Bank in an F. H. A. office about Archie L. and Viola Thompson for $2,395 [Omit Act 5 of count one indictment].

Count three, $1,600 loan application by Henry E. and Martha Green for $1,600 [Omit Act 1 of indictment].

Count four, October 15, 1952, loan application of $800 by Mandell and Moshell Dakes. [Omit Act 3 of count one].

Count five charges Max Shayne alone with having caused, on or about October 3, 1952, Eligh S. Moore and Vivian Moore to pass, utter and publish false statements to borrow $1,900 when only $1,600 was to be used for housing repairs; count six charges Max Shayne on or about September 5, 1952, with having caused David L. Hamilton to apply and receive $1,580 when he intended to use only $700 for the same. Count seven charges Max Shayne on or about July 15, 1952, with having caused Joe Olsen and Leona Olsen to have passed, uttered and published false statements to obtain $1,200 when they intended to use only $1,600 for the purposes set out in the application. Count 8 charged that on or about June 16, 1952, Max Shayne caused H. C. Cooper to pass, utter and publish false statements to the Citizens Bank to obtain $1,400 when they (he) intended only $700 to be used for the purposes set out in the application. Count Nine charged that on or about June 17, 1952, Max Shayne caused Earnest C. Johnson and Flordie Mae Johnson to pass, utter and publish certain false statements in a loan application to the Citizens National Trust and Savings Bank to obtain a loan of $1,300 "with intent to use the entire sum of $1,300 in a manner and for purposes other than as stated in the credit application."

Appellants moved to dismiss the indictment on the ground that it failed to constitute an offense against the United States; also that it violated the Sixth Amendment of the United States Constitution because it was too vague and failed to apprize the accused of the nature and cause of the accusation as required by that Amendment, embracing with reasonable certainty the particulars of time, place, and person. This motion was denied.

Motions were made for a Bill of Particulars under Rule 7 of Criminal Procedure for the District Courts of the United States, and denied as to each count except as hereinafter set out. This bill asked detailed specification as to each count as to: the exact statement or statements alleged to have been made [specification 3 of count one], the times, places, and persons present, the various documents referred to, the names of the co-conspirators, how and in what way sums would be used other than specified in the loan applications, and the exact sums intended to be used and for what purpose. The court ordered the bill granted only as to whether the Government will contend that any other persons were co-conspirators. Paragraphs 2, 6—the names of the persons the defendants allegedly met and assisted in obtaining loans. Paragraphs 8, 10, 11 of defendants' demand for bill as to count one, specifying the documents referred to in that count, the companies the defendants represented as salesmen, and the companies used to share work had been completed. As to all other matters and things, the bill was denied.

Motion for inspection of documents under Rule 17(2) for all documents was denied, except as "obtained from these defendants" was granted. In every other respect it was denied [Minutes of March 12, 1956].

A *subpoena duces tecum* to produce all documents, books, papers, objects (except memoranda prepared by Government counsel), including all papers, memoranda, records, solicited by, or presented or volunteered to any agency of the Government, was denied.

The trial lasted four weeks, resulting in acquittal of Irving Shayne as to all counts except the conspiracy count —count one. Max Shayne was convicted of counts 1, 2, 3, 5, 6, 7, and 9. Each defendant was sentenced to five years on count 1, and Max Shayne was sentenced to two years on each of the remaining counts, to run concurrently. Max Shayne has since died. It was so stipulated in the court of appeal.

Reasons for Granting the Writ.

1. The Circuit Court of Appeals has decided important questions of criminal law contrary to the decision of this court.

2. This court should grant certiorari to decide important questions of procedural law.

3. This court should grant certiorari in its supervisory capacity of criminal cases.

ARGUMENT.

I.

The Defendants Were Erroneously Charged With Multiple Conspiracies in a Single Conspiracy Count in Violation of the Rule of Kotteokos v. United States, 328 U. S. 750. This Procedure Denied Them Fair Trial, Guaranteed by the Due Process Clause of the Fifth Amendment.

The two defendants were charged with a series of separate and multiple little conspiracies. Each statement in an application for a loan was necessarily a separate conspiracy with the loan applicant and not one grand conspiracy, as charged in count 1. Being a series of alleged little conspiracies, the combination into one conspiracy was contrary to the rule laid down in *Kotteokos v. United States,* 328 U. S. 750.

Like the *Kotteokos* case, this was a case involving F. H. A. loans. Here, as there, a single person allegedly brought about the loan applications. But each was a separate party, making separate applications. This then, could not be a single conspiracy and was a misuse of the conspiracy statute.

The court in the *Kotteokos* case said the question it had to determine is whether a situation in which one conspiracy only is charged and at least eight having separate, though similar objects, are made out by the evidence, if believed; and in which more numerous participants in the different schemes were, on the whole, except for one, different persons who did not know or have anything to do with one another.

The case here has an analogous situation.

II.

The Trial Court Erroneously Sent the Indictment to the Jury Room During Its Deliberations. The Bill of Particulars Was Not Sent, This Eliminated All Other Persons as Conspirators Except the Two Defendants.

The indictment charged conspiracy with other persons than the two defendants. The government on the Bill of Particulars stated it would not contend that any other persons were conspirators. The indictment is not evidence. The Bill of Particulars limited its scope and the defendants could only be tried within its limits. (*United States v. Adams Express Co.*, 119 Fed. 240.) Sending the indictment to the jury room under these circumstances was particularly prejudicial. While we have no case directly in point, we think this necessarily follows on general principle. An indictment is merely the first pleading on the part of the government. It may be based on hearsay or anything the grand jury feels sufficient to accuse a person of crime. Only papers which have been received in evidence should go to the jury room. (*Winters v. United States*, 201 Fed. 845; *Holingren v. United States*, 217 U. S. 509, 54 L. Ed. 861.) The indictment was not offered or received in evidence. Furthermore, it was limited by the Bill of Particulars. (Rule 7C.) The Bill of Particulars gives the defendant specific notice of what he has to meet on the trial. (*Luess v. United States*, 104 F. 2d 225; *United States v. Dillons*, 101 F. 2d 829; *Filiabreau v. United States*, 14 F. 2d 659; *Glasser v. United States*, 315 U. S. 60, 66, 67.)

III.

The Trial Court Erroneously Instructed the Jury That Persons Other Than the Defendants Could Be Conspirators, Contrary to the Specification in the Bill of Particulars.

Since the government by its Bill of Particulars placed the defendant on notice that it would not contend that there were any other conspirators than the two defendants, it was prejudicial error to instruct the jury that other persons could be conspirators. This is like placing a person on trial on a charge not made.

Cole v. Arkansas, 33 U. S. 196, 92 L. Ed. 644;
De Jonge v. Oregon, 299 U. S. 353.

In *Cole v. Arkansas,* 333 U. S. 196 at page 201, the court said:

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, State or Federal."
>
> *Re Oliver,* 333 U. S. 257 at p. 273.

Here the defendant sought by Bill of Particulars to be placed on specific notice of the charge as to whether they were charged with conspiring with other persons and the Government elected by its Bill of Particulars to put them on notice that they would only be charged with conspiring with each other and no one else. They were therefore placed upon a trial upon a charge limited by the Bill of Particulars in effect were not so charged. (See

Cole v. Arkansas, 333 U. S. 196; *Dejonge v. Oregon,* 299 U. S. 353.) When the court instructed the jury therefore that they could be conspirators with other persons [R. Tr. 2452] when the court told the jury "Now, the case developed here has presented the possibility that many persons other than those on trial might lawfully be found members of a conspiracy. And if you believe one or the other or both of the defendants were members of such conspiracy, then you could return a verdict of guilty as to each defendant." The court, in effect, told the jury and placed the defendants on trial on a charge no longer made and specifically limited by the Bill of Particulars. We think this was of such prejudicial error as to require reversal of the judgments below.

IV.

The Indictment Failed to State an Offense Against the United States in That It Failed to Inform the Accused of the Nature and Cause of the Accusation as Required by That Amendment.

The Sixth Amendment to the Constitution of the United States must be read into every proceeding in the Federal Court and that amendment requires notice of the nature and cause of the accusation in the indictment.

Kotteokos v. United States, 328 U. S. 750;

United States v. Debrow, 346 U. S. 374, 98 L. Ed. 92;

United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 548.

V.

The Court Erred in Denying Defendants the Bill of Particulars as Requested. This Denied the Defendants an Opportunity to Prepare Fully for Their Offense. The Defendants in This Case Moved for a Bill of Particulars at the Beginning of the Case. The Request Was Quite Specific and Detailed and Necessary for the Defendants to Prepare Their Defense. The Court Denied the Motion, in Most Respects, as Requested.

In *United States v. Debrow,* 346 U. S. 378; *Glasser v. United States,* 315 U. S. 60, 66, the United States Supreme Court said: "If the defendants wanted more definite information as to the name of the person who administered the oath to them, they could have obtained it by requesting a Bill of Particulars, Rule 7—Fed. Rules of Criminal Procedure." But in the instant case the defendants did request the more definite information and it was denied, therefore, the defendants were highly prejudiced by this denial.

VI.

The Court Erred in Refusing the Defendants the Right of Full Inspection of All Documents and Refusing to Order Compliance With a Subpoena Duces Tecum.

The right to use the *Subpoena Duces Tecum* to produce documents into court for trial and defense is a basic right and anyone who has possession of these documents is as much required to produce them as any other person. The *Subpoena Duces Tecum* is a method of securing those documents into court for trial and for advance inspection of defense counsel. In this case it was highly important to examine the writings and compare them and

to determine facts regarding the applications made by the various witnesses for loans. This right, we think, is guaranteed by Rule 1617-C, Federal Rules of Criminal Procedure, and Rule 45-B, Federal Rules of Civil Procedure. (See *Bowman Dairy Company v. United States,* 341 U. S. 214, as modified by the Supreme Court this term in *Jencks v. United States,*)

If the Government declines to produce the documents thus subpoenaed it should be placed in the same position as in the case of *Jencks v. United States,* 23 Decisions of the United States Supreme Court of October Term, 1956.

In *Jencks v. United States,* Mr. Justice Brennan, speaking for the Court said on June 3, 1957:

> "We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce for the accused's inspection and for admission into evidence, relevant statements or reports in its possession of Government witnesses touching the subject matter of their testimony at the trial. Accord, *Roviaro v. United States,* 353 U. S. 53, 60-61. The burden is the Government's, not to be shifted to the trial judge to decide whether public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of State secrets and other confidential information in the Government's possession."

By analogy if the Government chose not to produce the documents in its possession which were relevant and the material to the defendants' preparation of their trial and chose to stand upon a motion to quash the subpoena, they should be compelled to dismiss the case in this instant and we so move this Honorable Court.

VII.

Title 18, Section 1010, United States Code, Has Been Unconstitutionally Construed and Applied, and Is Inherently Unconstitutional in Violation of the Due Process Clause of the Fifth Amendment as Being Too Vague, Indefinite, and Uncertain.

A statute to be constitutional must not be vague and indefinite.

Jordan v. De George, 341 U. S. 223;
Williams v. United States, 341 U. S. 97;
Larozettos v. New Jersey, 306 U. S. 451;
United States v. Cohen Grocery Co., 255 U. S. 81;
United States v. Wurzbach, 280 U. S. 396.

VIII.

The Section Regarding False Statements Requires the Application of the Two Witnesses Rule, as in Perjury Prosecutions. The Court Failed to so Instruct the Jury.

In this circuit the court has held that one witness is sufficient for the making of a false statement, but that rule was challenged in the United States Supreme Court in the case of *Gold v. United States,* 137, Oct. term, 1956, and has remained unanswered by that court. We ask the Honorable Court to re-examine the rule.

In *United States v. Levin,* 133 Fed. Supp. 88, the court said, in interpreting the Congressional intent:

> "[1] If the statute is to be construed as contended for here by the United States, the result would be far-reaching. The age-old conception of the crime of perjury would be gone. 18 U.S.C.A. §1621. Any person who failed to tell the truth to the myriad of government investigators and representatives about

any matter regardless, of how trivial, whether civil or criminal, which was within the jurisdiction of a department or agency of the United States, would be guilty of a crime punishable with greater severity than that of perjury. In this case the defendant could be acquitted of the substantive charge against him and still be convicted of failing to tell the truth in an investigation growing out of that charge, even though he was not under oath. An inquiry might be made of any citizen concerning criminal cases of a minor nature, or even of civil matters of little consequence, and if he wilfully falsified his statements, it would be a violation of this statute. It is inconceivable that Congress had any such intent when this portion of the statute was enacted. A literal construction of a statute is not to be resorted to when it would bring about absurd consequences, or flagrant injustices, or produce results not intended by Congress. *Sorrells v. United States,* 287 U. S. 435, 446, 53 S. Ct. 210, 77 L. Ed. 413. The lack of this intention is clearly illustrated from the fact that numerous statutes have been passed which authorize agents of different departments and agencies of the United States to administer oaths to those from whom they are seeking information. 5 U.S.C.A. §93, authorizes an officer or clerk of any of the departments lawfully detailed to investigate frauds on, or attempts to defraud the government or any irregularity or misconduct of any officer or agent of the United States to administer an oath to any witness called to give testimony. This authority was extended in 5 U.S.C.A. §93a. Special authority to administer oaths in the course of an investigation is given in the following statutes:

"5 U.S.C.A. §521 (Officers of Department of Agriculture who are designated by the Secretary); 5 U.S.C.A. §498 (Investigators with the Department

of Interior); 7 U.S.C.A. §420 (Secretary of Agriculture or any representative authorized by him in the administration of the Cotton Futures Act, Grain Standards Act, Warehouse Act, and Standard Containers Act); 8 U.S.C.A. §152, now 8 U.S.C.A. §§1225(a), 1357(b) (Immigration inspectors with respect to aliens); 12 U.S.C.A. §481 (Federal Bank Examiners in examination of federal banks or affiliates thereof); 18 U.S.C.A. §4004 (Wardens, superintendents, and associate wardens of Federal Penal Institutions); 19 U.S.C.A. §1486 (Customs officer, chief assistants or any employee of the Bureau of Customs designated by the Secretary of the Treasury, or in their absence, postmasters or assistant postmasters in matters involving less than $100); 26 U.S.C.A. §§3632(a) and 3654(a) (Collector, Deputy Collector of Internal Revenue, and agents and officers making investigations); 42 U.S.C.A. §272 (Medical Quarantine Officers of United States)."

IX.

The Verdicts Are Contrary to the Law and the Evidence. The Evidence Is Insufficient to Support the Verdicts.

(a) The Acquittal of Irving Shayne on All Substantial Counts Necessarily Acquitted Him of the Conspiracy Count Where the Prosecution Relies on Them to Establish the Conspiracy.

Where the conspiracy is founded upon the overt acts and the defendant is acquitted of all of the overt acts which necessarily embody the conspiracy, he is, in effect, adjudicated not guilty of the conspiracy.

Ex parte Johnson, 3 Cal. 2d 32;

Oliver v. Superior Ct., 92 Cal. App. 94.

The principle of *res adjudicata* would also apply since the acquittal of the substantive counts which necessarily include the lesser part of conspiracy would answer the question.

Sealfon v. United States, 332 U. S. 575.

(b) Since Only the Two Defendants Were Specified in the Bill of Particulars, Acquittal of Irving Shayne Would Require Acquittal of Max Shayne on the Conspiracy Count.

One only person cannot be guilty of a conspiracy.

Gross v. United States, 136 F. 2d 875.

(c) The Statement, if False, Was Not Made by the Defendant, the Statement Was the Independent Act of the Loan Applicant.

There is no proof that the loans were not the result of the independent acts of the borrowers. They were the ones who made out the applications.

(d) The Government Failed to Produce Two Witnesses to Each Alleged "False Statement."

If, as we contend, and as we pointed out earlier in the brief two witnesses are necessary to the false statement, as contended in *Gold v. United States,* 137 October term 1956, and *United States v. Levin,* 133 Fed. Supp. 88, then the government has failed to produce two witnesses to each alleged false statement and the evidence is insufficient.

X.

The Court Erred in Instructions Given and Refused.

(a) The Court Erred in Instructing the Jury That There Were Other "Conspirators" When the Government Had Limited the Conspiracy to the Two Defendants.

(b) The Court Erred in Failing to Instruct the Jury as to the Provisions of the Bill of Particulars.

The Court instructed the jury, contrary to the Bill of Particulars, as we pointed out in the statement of facts [R. Tr. 2452], and the prosecutor argued the same [R. Tr. 2293].

Since the Court failed to instruct the jury in accordance with the Government's own bill of Particulars, the defendants were highly prejudiced by such instruction which enlarged the case beyond the limitations.

XI.

Where It Develops That a Juror Who Sat on the Trial Had Defective Hearing and Another Went to Sleep During the Trial, a New Trial Should Have Been Granted.

The motion for a new trial should have been granted on proof (a) that one of the jurors had defective hearing, could not hear without a hearing aid and (2) that one of the jurors fell asleep during the trial and had to be awakened.

(1) One of the basic requirements of a jury trial, as guaranteed by the Sixth Amendment, United States Constitution, is qualified jurors. The duty of first selecting jurors who can hear and have no hearing defects is on the Jury Commissioner. A defendant has a right to presume that he has performed his official duty. Under the Federal Practice, jurors are interrogated by the court.

Juror Sampson had defective hearing [R. Tr. 2504-2506]. He wore a hearing aid and when it was off, or the battery not working, he couldn't hear a thing. Nevertheless he was one of the jurors in this case. Discovery of his defect was not made by the defense until the close of the case so it was charged on motion for new trial. The judge denied the motion.

(2) One juror fell asleep during the trial [R. Tr. 2544]. He was awakened, and continued to sit. During the time he was asleep the case was being tried by eleven other jurors, assuming that the juror with defective hearing could be counted. If he could not, the case was being tried by ten jurors qualified to see and hear and be awake. This was not a trial by a common law jury, as required by the Sixth Amendment, United States Constitution. The guarantee is trial by twelve jurors, who see, hear, feel, know what is going on at all times in the courtroom, and thereafter, based upon what they saw and heard, render intelligent and unanimous judgments thereon.

XII.

The Indictment Alleged That the Conspiracy Occurred Between June, 1952, and April, 1953. At That Time the Statute of Limitations Was Three Years. The Indictment Was Not Returned Until More Than Three Years After the Alleged Overt Acts 1, 2, 3 and 4. The Offenses Were Barred by the Statute. The Five-Year Statute Did Not Come Into Being Until a Later Date.

The offense, if any, was barred by the statute of limitations. The three-year statute of limitations applied.

The indictment alleged a continuing conspiracy from June 1952 continuing until April 1953. [Clk. Tr. 3-4.] The indictment was returned January 4, 1956.

However, the overt acts, in furtherance of the conspiracy, were all in 1952, except overt acts 5 and 6, which alleged the month of April, 1953. [Clk. Tr. 4.]

Overt Acts 5 and 6 related to the alleged transaction with Mr. and Mrs. Archie L. Thompson. Of these transactions the petitioner was acquitted. They were contained in the substantive count II. Hence the jury by its verdict found that appellant did not commit these acts, nor were these acts in furtherance of any conspiracy.

This leaves only the overt acts in 1952. The statute of limitations, as applied to this indictment, was three years, since the statute must date from the time of the alleged offense, and not from the date of the return of the indictment.

United States v. Lindsay, 346 U. S. 568;

Brown v. Elliott, 225 U. S. 392.

XIII.

The Court Erred in Failing to Grant Judgments of Acquittal on the Conspiracy Count When the Jury Acquitted Irving Shayne of All the Substantive Counts. There Cannot Be a Single Conspirator.

For each of the reasons we have set forth, the Court should have granted judgments of acquittal and we ask this Court now to direct judgments of acquittal to the Court below.

Wherefore defendant prays that certiorari be granted and for reversal of the judgment and for directions to the Court below to dismiss the indictment.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 156

IRVING SHAYNE, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Vol. XIX, 3-10) [1] is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1958, and a petition for rehearing was denied on June 9, 1958 (Vol. XIX, 11, 12). The petition for a writ of certiorari was filed on July 7, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] The record is in 19 volumes, which will be referred to by their volume numbers, except in the case of the trial transcript references (Volumes II through XVIII), which will be referred to as "R.".

QUESTIONS PRESENTED

1. Whether petitioner and his co-defendant were improperly charged with multiple conspiracies in a single conspiracy count.

2. Whether the trial court erred in sending a conspiracy indictment to the jury without also including a bill of particulars.

3. Whether the trial court erred in an instruction to the jury.

4. Whether the indictment was defective in failing to inform petitioner of the nature of the accusation against him.

5. Whether the trial court acted within its discretion in refusing various pre-trial motions for production of Government evidence.

6. Whether the statute proscribing knowing false statements in influencing action of the Federal Housing Administration regarding insured loans (18 U.S.C. 1010) is void for vagueness.

7. Whether the trial court erred in failing to instruct that the two-witness rule in perjury cases is applicable to 18 U.S.C. 1010.

8. Whether the evidence was sufficient to support petitioner's conviction for conspiracy, despite his acquittal under substantive counts.

9. Whether the trial court properly denied a motion for a new trial.

10. Whether the petitioner's conviction under the conspiracy count was barred by the then-existing three-year statute of limitations.

STATUTES INVOLVED

18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to de-

fraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

18 U.S.C. 1010 provides:

Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Administration, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

18 U.S.C. 2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands,

induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT

1. Max Shayne (now deceased) and his brother Irving Shayne, the petitioner, were charged in count I of an indictment returned in the United States District Court for the Southern District of California with conspiring from June 1952 to April 1953 with other persons (a) to defraud the United States by causing the Federal Housing Administration to insure loans for home improvements by reason of false and fraudulent written statements and (b) to commit offenses against the United States in violation of 18 U.S.C. 1010 and 18 U.S.C. 2 (*supra*, pp. 3-4) by causing false statements to be passed to lending institutions for the purpose of obtaining F.H.A.-insured loans.

It was alleged that as part of the conspiracy the defendants would induce home owners as "applicant-borrowers" to execute F.H.A. Title I credit applications, falsely stating that the applicants would use the proceeds of the loans to improve their property, whereas they intended to use the proceeds for other unauthorized purposes. It was also alleged that as part of the conspiracy the defendants, as salesmen for certain home improvement companies, would arrange for such work as was ordered to be performed by "subcontractors"; that the subcontractors would not perform the work, but defendants would submit false invoices from the subcontractors to the home improvement compa-

nies stating that the work had been completed, and defendants would acquire for their personal gain the money represented by the invoices (Vol. I, 2-5).

Counts II, III, and IV charged both defendants with substantive violations in relation to particular applicants and counts V to IX charged substantive violations against Max Shayne alone (Vol. I, 9-13).

The jury found Max Shayne guilty on Counts I, II, III, V, VI, VII, and IX, and the petitioner guilty on Count I (Vol. I, 207, 208). Petitioner was sentenced to imprisonment for five years (Vol. I, 234). On appeal (Vol. I, 235-236), petitioner's conviction was unanimously affirmed (Vol. XIX, 11). Max Shayne died during pendency of the appeal.

2. The general pattern of procedure adopted by the two defendants is shown by their dealings in relation to the Thompson, Green, and Drakes transactions (Counts II, III, IV).

a. *Thompson account*—In the spring of 1953, Archie Thompson and his wife, Viola Thompson, resided in a house behind a restaurant at 10962 South Avalon Boulevard in Los Angeles. They owned a home at 5126 Towne Avenue (R. 3, 12). While Thompson was working on a roof for the dining room of the restaurant, Max Shayne and petitioner said that they could get him a few thousand dollars to finish the building (R. 4-7). A few days later, the Thompsons signed a Title I credit application (Ex. 1-I) on the home at 5126 Towne Avenue; the application had been filled in by Viola on instructions from the Shaynes (R. 10-16, 43, 59-61, 78). The Shaynes directed the Thompsons to take the credit application to a bank, together with an estimate by Clipper and Sons which

the Shaynes had furnished for work to be done on the Towne Avenue house (R. 16-17, 20, Ex. 3-II).

Several days later, the Thompsons went to the bank, signed a loan note (Ex. 2-II), and received a check for $2395, which was deposited to their bank account. Viola Thompson's personal check for $895 (Ex. 4-II) was delivered to petitioner (R. 17-19, 21, 23-24, 47, 50, 54-56, 62, 64-65, 1608-1609). Originally the Shaynes had stated that the fee for obtaining the loan would be several hundred dollars, but later petitioner insisted on the $895 fee reflected by the check (R. 24-25, 29, 75). Irving Wolf, a brother-in-law of the Shaynes, received the $895 check from one of them and cashed it. Wolf delivered the money to the home of one of the Shaynes, but did not remember which brother it was. (R. 88-89).

None of the money was used for work on the Towne Avenue house, and no work in the Albert Clipper estimate (Ex. 3-II) was performed by Clipper or anyone else. This work had been done by Archie Thompson himself at an earlier date (R. 26-28).

b. *Green account*—In June 1952, the Shayne brothers called upon Henry and Martha Green at their home (R. 99-100, 105). Green explained to both Shaynes that he was about six or eight payments behind on his home mortgage, that he had not had any regular employment between 1949 and 1952, and that he needed $800 to save his home from foreclosure (R. 103-104, 106-107). Max Shayne said: "* * * I will get you $800 if you will agree to pay back $1600.00" (R. 109).

A bank F.H.A. loan with net proceeds for $1600 was issued in accordance with a Title I credit application

(Ex. 5-III) in the names of "Harry Greene" and "Margaret Greene" (R. 1621-1624). The Shayne brothers went to the Green home again, and Max Shayne gave Green eight one-hundred dollar bills (R. 112-113). Green testified that, in the conversation with the Shaynes, no mention was made of work to be done on his home and no such work was ever performed (R. 118). When Green was shown a subcontractor's invoice from Smith & Co. (Ex. 9-III), he stated that the address shown was that of his home, but that none of the work described had been done on his premises (R. 121-122).

Green denied that he was ever asked to sign papers for the loan. He testified that his wife signed some papers on the occasion when they received the eight one-hundred dollar bills (R. 111, 113). Green denied that the credit application (Ex. 5-III) bore genuine signatures either of himself or his wife, and denied that the contract with Commercial Improvement Company (Ex. 7-A-III and 7-B-III; R. 1081) had been signed by his wife or by him (R. 117, 120).

The Shaynes brought the Green account to Commercial Improvement Company and selected the subcontractor, Smith & Co., whose invoice (Ex. 9-III) was paid by Commercial (Ex. 65-III). Nathanson, Commercial's vice-president, had no personal knowledge of, and never sent work out to, this subcontractor. The Shaynes received $466.66 commission on this account (R. 1080-1088, 1260-1261).

c. *Drakes account*—In October 1952, Moshell Drakes, who resided at 620 E. 89 Street, was visited by a person whom she knew as the "Money Man" from a business card (Ex. 14-IV) used by the Shaynes (R. 171, 173,

177, 202, 214-215). Mrs. Drakes and her husband signed for the "Money Man" a Title I credit application (Ex. 11-IV), a contract with Commercial Improvement Company (Ex. 12-IV), and a completion certificate (Ex. 13-IV) covering certain work (R. 173, 175-176). On a later occasion, the "Money Man" delivered to the Drakes eight one-hundred dollar bills (R. 178-179, 586). The Drakes used the $800 to pay personal bills (R. 193-196, 579).

In regard to the Commercial Improvement Company contract (Ex. 12-IV), the porch work listed in the first paragraph was performed, but the interior work had been done before the Drakes met the "Money Man", and the last paragraph was added after the contract had been signed (R. 179-181, 192-193). The proceeds of $1390 for the Drakes' loan was deposited to the account of Commercial Improvement Company (R. 262-264).

James Marsh, a carpenter hired by petitioner to do the porch work on the Drakes' home, made an estimate (Ex. 21-IV) in which he left out the price at petitioner's request (R. 202-205). Marsh testified that parts of this exhibit were not his handwriting (R. 206-207). He stated that he did not charge $1030 as represented by this exhibit for the work done, but charged $228 which he received in cash from petitioner as shown by his (Marsh's) work book (Ex. 22-IV; R. 208-210). The check of the Commercial Improvement Company for this $1030 was not endorsed by Marsh or cashed by him (R. 212-213).

ARGUMENT

None of petitioner's numerous objections to his conviction, which was unanimously affirmed by the Court of Appeals, presents a question calling for review by

this Court. The decision below is correct; there is no conflict; and no other reason appears for the grant of certiorari.

1. Petitioner first contends that he and Max Shayne were erroneously charged with multiple conspiracies in a single conspiracy count, contrary to the rule of *Kotteakos* v. *United States,* 328 U. S. 750 (Pet. 10). It is clear, however, that the two operated together in a single continuing scheme to submit false claims in respect to FHA Title I loans, with knowledge that the money so procured would not be used for home improvements. Cf. *Nye & Nissen* v. *United States,* 336 U. S. 613, 616-617. Unlike *Kotteakos,* where Brown, the central key figure, was not before the court, the individual home owners were not defendants here. The holding of *Kotteakos* is that such individual owners are not in conspiracy with each other even though they act through the same man. That ruling does not apply to the perpetrators of the whole plan, working in concert with each other.

At the trial, furthermore, the defendants did not urge that they were improperly charged with multiple conspiracies and the court's charge to the jury treated the conspiracy as single (R. 2424-2434, 2453-2454). The multiple conspiracy argument is an afterthought.

2. Count I of the indictment on conspiracy charged that petitioner and Max Shayne conspired "together and with other persons, whose names are to the grand jury unknown" (Vol. I, 2). A bill of particulars, furnished by the Government prior to trial, contains this statement: "The Government will not contend at the trial that any other persons were co-conspirators with the defendants" (Vol. I, 70). There is no merit to

petitioner's contention (Pet. 2, 11) that the court erred in sending the indictment to the jury room without also sending the bill of particulars, which narrowed the scope of the indictment so that the jury could consider only the two defendants as possible co-conspirators.

It was within the trial court's permissible discretion to send the indictment to the jury without also including the bill of particulars. Cf. *C.I.T. Corporation* v. *United States*, 150 F. 2d 85, 91 (C.A. 9); *Little* v. *United States*, 73 F. 2d 861, 864 (C.A. 10). The court properly instructed the jury that the indictment was not evidence, but merely the means by which the case was brought to trial and the issues were framed (R. 2411). Early in the trial, the court informed counsel that the indictment would be given to the jurors for their deliberation on the verdict and stated, "If there are some parts of this indictment that the defense feels should not be read, advise me and I will consider not reading any portion as to which you think there should be an omission" (R. 1121-1122). The defense did not object to this procedure or ask for deletion of the part of the indictment charging the defendants' conspiracy with other unknown persons.

3. During deliberation on the verdict, the jury asked the court whether one Shayne could be convicted on the conspiracy count without convicting the other. After referring to its earlier instructions regarding conspiracy, the court stated (R. 2453-2454):

> While it is necessary that there be two or more conspirators, one of the persons on trial can be found to have not been one of the two or more.

> Now, the case as it has developed here has presented the possibility that many persons other than those on trial might lawfully be found to have been members of a conspiracy. And if you believe one or the other or both of the defendants were members of such conspiracy, then you could return a verdict of guilty as to such defendant.

The jury then asked whether, in the event they found a conspiracy in one count, it would affect the other counts. The judge replied in part that "the fact that you arrive at a verdict on the conspiracy does not foretell what your verdict would be on the other counts" (R. 2454-2455).

Petitioner argues that, since the Government by its bill of particulars stated that it would not "contend" that other persons were co-conspirators with the two defendants, the quoted instruction was erroneous in placing the defendants on trial for a charge not made (Pet. 12-13, 20). Since the defense did not object to the instruction as given, it is foreclosed from raising the issue now. Rule 30, F. R. Crim. P. Moreover, in the light of the whole colloquy and in view of the fact that petitioner was acquitted on the substantive counts, the instruction now objected to was favorable to petitioner since it permitted the jury to find Max Shayne (whom the jury obviously considered the guiltier of the two) alone guilty of conspiracy.

4. There is no merit to petitioner's assertion that the indictment failed to disclose the nature of the accusation against him (Pet. 13). Count I of the indictment (Vol. I, 2-5) sufficiently charged a conspiracy for obtaining money under fraudulent FHA loans, with

knowledge that the money would not be used for home improvements. It described in detail the period of time the conspiracy was in effect, its object and method of operation, and enumerated specific overt acts.

5. a. Prior to trial, the defendants filed a lengthy motion for a bill of particulars which requested, among other things, the false statements involved in each count, the exact sums diverted for use of applicant-buyers and their purposes, the times, places, and persons present during the conspiracy, and names of the co-conspirators (Vol. I, 16-22). This motion was granted as to paragraphs 2, 6, 8, 10, and 11 thereof (Vol. I, 69). The bill of particulars as to paragraph 2 stated that the "Government will not contend at the trial that any other persons were co-conspirators with the defendants"; as to paragraph 6, listed certain homeowners; as to paragraph 8, listed certain documents; as to paragraph 10, named several salesmen; and as to paragraph 11, listed companies used by the defendants to purport to show that work had been completed (Vol. I, 70-71). This was sufficient information to enable petitioner to prepare his defense.

b. Defendants filed a motion under Rule 16, F. R. Crim. P., for discovery and inspection of "all books, all papers, all documents, and all tangible objects relating to the within cause and in possession of the plaintiff, which items were (1) obtained from these defendants, or (2) belonged to these defendants, or (3) were obtained from others by seizure or process" (Vol. I, 23-24). The court ordered that this motion should be granted as to documents "obtained from these defendants", but denied as to the remainder (Vol. I, 69). Defendants also moved for production under a subpoena duces tecum under Rule 17(c), F. R. Crim. P., of

all documents, books, papers, objects (except memoranda prepared by Government counsel) including all papers, memoranda, and records solicited by, or presented or volunteered to any agency of the Government. This was denied (Vol. I, 29-31).

Petitioner contends that the trial court erred in not granting these motions in their entirety (Pet. 14-15). The court, however, acted well within its discretion in its rulings on these motions, which were too broad in seeking complete discovery of the Government's case. Insofar as the Government had obtained anything from the defendants, the motion for discovery was granted, and there was no showing that any additional matter had been acquired by seizure or process. The defendants' all-inclusive subpoena under Rule 17(c) was properly denied as in the nature of a "fishing expedition." Cf. *Bowman Dairy Co.* v. *United States*, 341 U. S. 214, 221.

Jencks v. *United States*, 353 U. S. 657 (see Pet. 15), requires production of statements by Government witnesses for purposes of impeachment after they have begun their testimony. See also 18 U.S.C. (Supp. V) 3500. In the one instance at the trial where the defense demanded such a statement, it was produced and introduced in evidence (R. 1046-1049, 1051-1052).

6. Petitioner makes the broad assertion that 18 U.S.C. 1010 (*supra*, p. 3) is unconstitutional and void by reason of vagueness. He does not point out wherein the alleged indefiniteness of the statute inheres, or how he was prejudiced in not being clearly informed of the nature of the charge against him (Pet. 16).

This Court has observed that the test of whether a statute can survive an attack for vagueness is "whether the language conveys sufficiently definite warning as to

the proscribed conduct when measured by common understanding and practices." *Jordan* v. *DeGeorge*, 341 U. S. 223, 231-232. 18 U.S.C. 1010 meets this test. It prohibits the making, passing, or publishing of any statement, knowing it to be false, forged or counterfeited, for the purpose of influencing the action of the Federal Housing Administration on an insured loan. The language is definite and contains terms readily susceptible of common understanding.

7. There is no substance to petitioner's contention that the court erred in failing to instruct the jury that 18 U.S.C. 1010 required application of the perjury rule requiring two witnesses, or one witness plus independent corroboration (Pet. 16-18).

The principal reasons behind the two-witness rule are that a conviction for perjury ought not to rest entirely upon "an oath against an oath," and the fear that innocent witnesses might be too easily convicted of perjury if a less stringent rule were applicable. *Weiler* v. *United States*, 323 U. S. 606, 609. These reasons are not applicable in a prosecution under 18 U.S.C. 1010, which does not even require that the false statement be under oath—an ingredient implicit in perjury. It is established that the perjury rule does not apply to prosecutions under an analogous statute, 18 U.S.C. 1001, proscribing false statements about any matter within the jurisdiction of any department or agency of the United States. *E.g., Fisher* v. *United States*, 231 F. 2d 99, 105-106 (C.A. 9); *Todorow* v. *United States*, 173 F. 2d 439, 443-444 (C.A. 9), certiorari denied, 337 U. S. 925. See also *Gold* v. *United States*, 237 F. 2d 764, 765-767 (C.A. D.C.), reversed on another ground, 352 U. S. 985.

8. Petitioner contends that the evidence was insufficient to support his conviction (Pet. 18-19, 22). The trial court observed that this is the "strongest case of its kind we have had in this department, so far as the evidence is concerned" (R. 2553). Both courts below having found the evidence sufficient, there is no occasion for further review of the evidence by this Court. See *Kann* v. *United States,* 323 U. S. 88, 93; *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 589-590.

The doctrine of *res judicata* does not apply to make petitioner's acquittal under the substantive counts a bar to the conspiracy conviction. Unlike *Sealfon* v. *United States,* 332 U. S. 575, where the conspiracy and substantive counts were litigated in successive trials under separate indictments, here the conspiracy and substantive counts were litigated in the same trial and there was additional and different evidence introduced under the conspiracy count. Consistency in a jury's verdict is not required. Cf. *United States* v. *Petti,* 168 F. 2d 221, 224 (C.A. 2); *United States* v. *Bazzell,* 187 F. 2d 878, 884-885 (C.A. 7), certiorari denied, 342 U. S. 849.

9. While the clerk was polling the jury, juror Sampson, who wore a hearing aid, at first misunderstood the question as to whether his verdict was guilty on the various counts against Max Shayne, but answered that this was his verdict after the question and verdict were read to him again (R. 2499-2501). Counsel for both defendants moved for a new trial on the ground that this juror probably did not hear all the trial testimony (R. 2504-2505, 2516). The court observed, however, that this juror had heard the questions on voir dire, that he had been alert during the trial, and that the

question of his defective hearing had not been raised during the trial. The court made a finding that the juror had heard the evidence at the trial (R. 2505, 2516-2517, 2547-2548).

The two defendants made affidavits that during the trial juror Jones fell asleep for between one to two minutes (R. 2554). The court, however, stated that the whole incident took only about 30 seconds from the time when the juror dozed off on a hot day and the bailiff walked over to awaken him (R. 2549-2550, 2555). This occurred on about the sixth day of a trial lasting almost a month, at a time when a Government witness was giving "telling evidence against the defendants" (R. 2552). In its ruling on the motion for a new trial, the court viewed the incident as "trivial", and emphasized that, if the defendants had considered it prejudicial, they would have objected at the trial, when an alternate juror could have replaced juror Jones (R. 2552-2553).

Under the circumstances, the trial court acted well within its discretion in denying the motion for a new trial (Pet. 20-21). Cf. *Bush* v. *United States*, 16 F. 2d 709, 711 (C. A. 5); *United States* v. *Baker*, 24 Fed. Cas. No. 14,499 (S.D. N.Y.); *United States* v. *Boyden*, 24 Fed Cas. No. 14,632 (D. Mass.).

10. Petitioner contends (Pet. 21-22) that, since only overt acts 5 and 6 occurred within three years of the return of the indictment and since he was acquitted of the substantive offenses involving those transactions, the conspiracy was barred by the then-existing three-year statute of limitations (18 U.S.C. 3282).[2] The statute of limitations runs from the last

[2] Overt acts 5 and 6 occurred in April 1953 and the indictment was returned on January 4, 1956 (Vol. I, 2-5, 213). 18 U.S.C. 3282 was amended on September 1, 1954 to increase the limitations period from three to five years.

overt act during the existence of the conspiracy. *Fiswick* v. *United States,* 329 U. S. 211, 216; *Brown* v. *Elliott,* 225 U. S. 392, 401.

Petitioner's premise, that by reason of his acquittal under count II he was also exonerated of the transactions in overt acts 5 and 6, is not correct. The substantive charge regarding the Thompson fraud in count II was much broader than overt acts 5 and 6, even though both acts were related to the events alleged in count II. It was entirely possible that the jury might have believed that both defendants engaged in either of the transactions alleged in overt acts 5 and 6, and yet might not have been convinced that there was sufficient additional evidence to hold petitioner on the substantive count. Moreover, as already pointed out (*supra,* p. 15), consistency in a jury's verdict is not required.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
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